Supreme Court, U.S.
FILED

942011 JUN 8 - 1995

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No. ____

In The

Supreme Court of the United States

October Term, 1994

RAY QUALMANN MARINE CONSTRUCTION, INC.,

Petitioner,

vs.

KIMBERLY ANN SAN, Individually and as Personal Representative of the Estate of LAZARO JESUS SAN, Deceased,

Respondent.

Petition For Writ Of Certiorari To The District Court Of Appeal Of The State Of Florida For The Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the survivors of a harbor worker killed in territorial waters of the State of Florida are entitled to recover non-pecuniary damages following this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 285 (1990).

LIST OF PARTIES

Petitioner: Ray Qualmann Marine Construction, Inc.

Respondent: Kimberly Ann San, Individually and as Personal Representative of the Estate of Lazaro Jesus San, Deceased

Ray Qualmann Marine Construction, Inc. had an insurance policy with New York Marine & General Insurance Company, but that insurer has denied coverage to the Petitioner.

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DECISION BELOW

On March 22, 1995, the Florida District Court of Appeal for the Fourth District affirmed without opinion (App. 1[1]) final judgments[2] entered in favor of the Respondent awarding non-pecuniary damages for the death of a harbor worker in Florida territorial waters. At the beginning of the trial, the Plaintiff/Respondent stipulated that she sought to recover only non-pecuniary damages. (App. 9-12) The Petitioner argued before the jury was selected that as a matter of law, non-pecuniary damages were not recoverable. (App. 6-19) The Trial Court ruled that the Plaintiff/Respondent could recover non-pecuniary damages. (App. 13-19) Following the jury verdict in favor of the Plaintiff, the Defendants moved for entry of judgment in its favor notwithstanding the verdict (App. 20), and this was denied. (App. 24) Thereafter a timely appeal was filed by the Petitioner to the District Court of Appeal for the Fourth District of the State of Florida. (App. 26) In the appeal, the Petitioner asserted that the Respondent was not entitled to recover non-pecuniary damages arising from the death of a harbor worker in Florida waters.[3] (App. 28)

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[1] Throughout this Petition, references to the Appendix shall be "App. # " designating the page or first page of the document referred to which is included in the attached appendix.

[2] App. 2 and App. 4. One was based on a jury verdict and the other was for costs.

[3] Petitioner's Initial Brief in the Florida 4th District Court of Appeals is in the attached Appendix. (App. 28-69)

JURISDICTION

This Court in November of 1990 held in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 285 (1990) that there would be uniformity in all wrongful death actions under federal maritime law, and that non-pecuniary damages were not recoverable for deaths occurring within territorial waters of the states or on the high seas. The action below was brought under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq. ("LHWCA") as a result of the death of a harbor worker which occurred while he was replacing a seawall on the Intracoastal Waterway in Fort Lauderdale, Florida.[4] Although an action against the Petitioner, as the decedent's employer, was barred by worker's compensation immunity generally, the Respondent proceeded against the Petitioner, as the owner of a barge involved in the death of the decedent, under Section 905(b) of LHWCA which provides a limited cause of action for vessel owner negligence.[5] Causes of action brought pursuant to 33 U.S. § 905(b) are governed by substantive federal maritime law. *See e.g. Robertson v. ARCO Oil and Gas Co.*, 766 F. Supp. 535 (W.D. Ca. 1991), *aff'd on other grounds*, 948 F.2d 132 (5th Cir. 1991); *T.J. Hollie v. Consolidated Natural Gas Service Co., Inc.*, 1993 A.M.C. 2161, 1993 W.L. 22191 (E.D. La. 1993). The Trial Court and Florida

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[4] The Intracoastal Waterway is a navigable waterway controlled by the Federal government. *See McCormick v. U.S.*, 680 F.2d 345 (5th Cir. 1982).

[5] Vessel owner liability was the only liability possibly attributable to the Petitioner because worker's compensation immunity barred any action against the Petitioner under either federal or Florida law. (App. 39-50).

Fourth District Court of Appeal decisions referred to herein are directly contrary to this Court's decision in *Miles v. Apex Marine Corp., supra,* and thus review is proper under Rule 10 of the Rules of this Court.

Because the Fourth District Court of Appeal decided this case on a "per curiam" basis without an opinion (App. 1), further review by courts of the State of Florida was not available. *See:* Article V Section 3(b)(3) of the *Florida Constitution; St. Paul Title Ins. Corp. v. Davis,* 392 So.2d 1304 (Fla. 1980); *Committee notes* to Fla. R. App. P. 9.303; *Alan v. McClamma,* 500 So.2d 146 (Fla. 1987). *See also: [Florida] Supreme Court Manual of Internal Operating Procedures, Section II.A.1(A)* (July 1989). Review by this Court under these circumstances is proper. *See: Nash v. Florida Industrial Commission,* 389 U.S. 235, 237, n.1., 88 S.Ct. 362, 365, n.1, 19 L.Ed.2d 438, 441, n.1 (1967).

STATUTE INVOLVED

The only legal basis for the Plaintiff's recovery was the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), which applies to the deaths of harbor workers engaged in maritime employment upon navigable waters of the United States. 33 U.S.C. § 903. *See also Browning v. B.F. Diamond Const. Co.,* 676 F.2d 547 (11th Cir. 1982) (foreman in charge of crane barge was covered by LHWCA where barge was moored in federal waters and crane was unloading metal forms); *Lemelle v. B.F. Diamond Construction Co.,* 674 F.2d 296 (4th

Cir. 1982) (construction worker employed for the construction of a bridge spanning navigable waters is covered by LHWCA); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir. 1982) (employee injured while unloading barge is covered by LHWCA); *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980) (carpenter working on a pier is covered by LHWCA).

The specific section under which relief was sought in this case was 33 U.S.C. § 905(b) which provides as follows:

> **(b) Negligence of vessel**
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the

vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On March 28, 1990, Lazaro Jesus San, while in the employ of Ray Qualmann Marine Construction, Inc., the Petitioner, was killed in a construction accident involving a barge used in the replacement of a seawall protecting a home on the Intracoastal Waterway in Fort Lauderdale, Florida. The case proceeded to trial December 13 through 16, 1993, with the Plaintiff asserting a cause of action under Section 905(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.* The Plaintiff/Respondent stipulated at the outset of the trial that she sought only "non-pecuniary damages." (App. 6-12). During and following the trial, Petitioner Qualmann requested the Trial Court to enter judgment in its favor because the Plaintiff was not entitled to recover non-pecuniary damages under the general maritime law. (App. 13-19). The Trial Court denied all of Qualmann's requests for a judgment for the Defendant. A final judgment was entered on the jury verdict. (App. 2), and a separate judgment for costs was entered. (App. 4).

A Motion for Judgment Notwithstanding the Verdict was filed by the Petitioner (App. 20) on December 27, 1993, and was heard by the Trial Court on January 25, 1994. The Motion Notwithstanding the Verdict (App. 20) was denied on January 31, 1994 (App. 24). Thereafter an appeal was pursued to the Florida Fourth District Court of Appeal on February 14, 1994 (App. 26) in which it was argued that because the Plaintiff/Respondent had sought and recovered only non-pecuniary damages, the Defendant/Petitioner was as a matter of law entitled to reversal.[6] On March 22, 1995, the Fourth District Court of Appeal affirmed the Trial Court without opinion (App. 1), and thus no further review or relief was available in the Florida state court system.[7]

In the appeal below, two legal errors were asserted: First, that Respondent's exclusive remedy was worker's compensation benefits under the Longshore and Harbor Worker's Compensation Act; and second, that San's survivors could not recover non-pecuniary damages in a maritime wrongful death action. (App. 50-60) Only the second issue, the assertion that there is no recovery for non-pecuniary damages under the general maritime law since this Court's decision in *Miles v. Apex Marine Corp.*, is the subject of this Petition. This issue was raised during trial, prior to submission of the case to the jury (App. 6-19), following the verdict in a motion notwithstanding

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[6] This argument is set out in the Appendix at pages 50 through 60.

[7] *See* authority set out at pages 2 and 3 of this Petition concerning Jurisdiction.

the verdict (App. 20), and in the appeal which followed (App. 28-69).

REASON FOR GRANTING THE WRIT

The decision below, by allowing recovery of non-pecuniary damages, i.e., loss of society, in a maritime wrongful death action, directly conflicts with and ignores this Court's decision in *Miles v. Apex Marine Corp.* In *Miles,* this Court specifically stressed the need for uniformity in all maritime wrongful death causes of action, regardless of whether they occurred on the high seas or in state territorial waters. Unfortunately, numerous courts have misinterpreted or ignored the Court's holding in *Miles,* and have permitted recovery of non-pecuniary damages in cases involving deaths of longshore and harbor workers killed in state territorial waters. As discussed below, these decisions not only defeat the uniformity goal of *Miles v. Apex,* to provide the same wrongful death benefits for seamen, longshore workers, harbor workers, passengers, and all others killed on navigable waters regardless of their location, i.e., in territorial waters or on the high seas, but many of these decisions, for no logical reason, create a special class of maritime persons, i.e., longshore and harbor workers, who, only when injured in state territorial waters, can recover non-pecuniary damages.

In 1990, this Court in *Miles* changed the damages recoverable under general maritime law for maritime wrongful deaths. As with most admiralty cases, *Miles* was not decided in a vacuum, but was a result of changes in

the admiralty law over time. To understand the decision and significance of *Miles*, it is necessary to consider the history of admiralty law regarding maritime wrongful deaths.

A maritime wrongful death remedy was unknown until this Court decided *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). In *Moragne*, the plaintiff was the widow of a deceased longshoreman killed in state territorial waters. 398 U.S. 376, 90 S.Ct. 1775 (1970). The *Moragne* Court reversed the trial and appellate courts' determination that absent a statutory remedy, the *Moragne* plaintiff could not bring a maritime wrongful death claim. The *Moragne* Court reasoned that a wrongful death claim should be generally available for maritime wrongful deaths because in passing the Death on the High Seas Act[8] and the Jones Act[9] which provided for wrongful death causes of action for deaths on the high seas and deaths of seamen wherever occurring, respectively, Congress had evinced a policy of providing a remedy for maritime wrongful deaths. 398 U.S. 393-409, 90 S.Ct. 1784-92 (1970).

The *Moragne* Court did not address the issue of damages recoverable for a maritime wrongful death. This Court addressed the damages issue in 1974 in the case of *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). The plaintiff in *Gaudet*, like the *Moragne* plaintiff, was also the widow of a longshoreman

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[8] Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et seq.*

[9] 46 U.S.C. § 688.

killed in state territorial waters. The *Gaudet* Court found that non-pecuniary damages, i.e., loss of society, companionship, comfort, protection, care and affection, were recoverable in a maritime wrongful death action. Four years later, this Court decided whether the holding in *Gaudet* would be applied beyond state territorial waters to permit the recovery of non-pecuniary damages by the widow of a helicopter passenger killed in a crash in the Gulf of Mexico. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). The *Higginbotham* Court found that DOHSA applied. Under DOHSA, non-pecuniary damages cannot be recovered. The *Higginbotham* Court specifically rejected the plaintiff's argument that general maritime law as set forth in *Gaudet* could be used to supplement DOHSA and permit the recovery of non-pecuniary damages in all maritime wrongful death actions. 436 U.S. at 624, 98 S.Ct. at 2014. This Court decided that uniformity in recoveries for wrongful death actions was not as important as the application of DOHSA to the *Higginbotham* facts. *Id.*

This Court reconsidered the inconsistency created between *Gaudet* and *Higginbotham* when it decided *Miles*. In *Miles*, the plaintiff was a nondependent survivor of a seaman killed in state territorial waters. The issue presented and decided by this Court was whether the plaintiff could recover non-pecuniary damages under general maritime law. The *Miles* Court specifically held:

> We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman. Our decision also remedies an anomaly we created in *Higginbotham*. Respondents in that case warned

> that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under *Gaudet*, and deaths on the high seas. We recognize the value of uniformity, but concluded that a concern for consistency could not override the statute. [citations omitted]. Today we restore a uniform rule applicable to all actions for wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

111 S.Ct. at 326 (1990). Clearly, the *Miles* Court reduced the damages recoverable under general maritime law for wrongful death under *Gaudet*. This Court specifically stated that it remedied the inconsistency between *Gaudet* and *Higginbotham*. If *Gaudet* was still good law, the inconsistency between *Gaudet* and *Higginbotham* would remain, i.e., the availability of recovering non-pecuniary damages for maritime wrongful deaths occurring in state territorial waters, but not on the high seas.

This Court has now come full circle. In *Moragne*, the Supreme Court created a maritime cause of action by extending the policies of DOHSA and the Jones Act. *Moragne*, 398 U.S. 393-409, 90 S.Ct. 1784-92 (1970). *Miles* has now extended the limited scope of damages recoverable under DOHSA and the Jones Act to wrongful death actions under general maritime law.

In applying a uniform rule of denying the recovery of non-pecuniary damages in a maritime wrongful death action, the *Miles* Court negated *Gaudet* by holding that *Gaudet* was limited to its facts with a caveat that the 1972

amendments to the LHWCA have rendered *Gaudet* inapplicable on its facts. 111 S.Ct. at 325 (1990). The significance of limiting a case to its facts when the case no longer has any application was addressed by the *Miles* Court. *Gaudet* involved the death of a longshoreman in state territorial waters. The *Miles* court recognized that if the *Gaudet* case was brought after the 1972 amendments to the LHWCA, the plaintiff's action would have been barred by the LHWCA's worker's compensation immunity. The *Miles* Court also noted that the plaintiff in *Moragne,* like the plaintiff in *Gaudet,* would have been barred from bringing an action after the 1972 amend ments to the LHWCA. 111 S.Ct. at 323. The *Miles* Court specifically rejected the argument that *Moragne* be limited to its facts, and held:

> Were we to limit *Moragne* to its facts, [the] *Miles* [plaintiff] would have no general maritime wrongful death action. *Indeed, were we to limit Moragne to its facts, that case would no longer have any applicability at all.* In 1972, Congress amended the Longshore and Harbor Worker's Compensation Act [citations omitted] to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness. [citations omitted]. If *Moragne* would have brought her action today, it would be foreclosed by statute. [Emphasis added.]

111 S.Ct. at 323 (1990). Applying the reasoning of the *Miles* Court used to reject the argument that *Moragne* be limited to its facts, it is clear that by limiting *Gaudet* to its facts, *Gaudet* "no longer has any applicability at all."

Miles, 111 S.Ct. at 323 (1990). *See Lane v. G & C Towing Co., Inc.*, 798 F. Supp. 358 (S.D. W. Va. 1992).[10]

Since the decision in *Miles*, federal courts have uniformly dismissed claims for loss of society or consortium (i.e., non-pecuniary damages) brought by dependent relatives or survivors of injured or deceased seamen. *Lollie v. Brown Marine Service*, 995 F.2d 1565 (11th Cir. 1993); *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993); *Smith v. Trinidad Court*, 992 F.2d 996 (9th Cir. 1993); *Murray v. Anthony J. Bertucci Construction Co.*, 958 F.2d 127 (5th Cir. 1992); *Mechel v. Total Transportation, Inc.*, 957 F.2d 186 (5th Cir. 1992); *Lane v. G & C Towing Co.*, 798 F. Supp. 358 (S.D. W. Va. 1992); *Reynolds v. Zapata Off-Shore Co.*, 796 F. Supp. 1015 (S.D. Tex. 1992); *Matter of Waterman SS Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Duplantis v. Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991); *Dunbar v. American Commercial Barge Lines, Co.*, 771 F. Supp. 151 (M.D. La. 1991); *Turley v. Co-Mar Off-Shore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991); *Melancon v. Petrostar Corp.*, 762 F. Supp. 1261 (W.D. La. 1991); *Cater v. Placid Oil Co.*, 760 F. Supp. 568 (E.D. La. 1991); *Breland v. Western Oceanic, Inc.*, 755 F. Supp. 718 (W.D. La. 1991); *Anglada v. Tide Water, Inc.*, 752 F. Supp. 722 (E.D. La. 1990). *See also*, Wolfgang Hoppe, *The Supreme Court at Sea, Twenty Years of Admiralty Jurisprudence*, 24 Mar. Law and Com. J. 671 (1993); William B.

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[10] The *Lane* Court found that the *Miles* decision overruled, on the issue of recovery of non-pecuniary damages, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980), the holdings and facts of which were the same as *Gaudet*, except that *Alvez* involved a plaintiff who was an injured longshoreman, rather than plaintiffs who were survivors of a deceased longshoreman.

Milliken, Carl R. Nelson, Roger A. Vaughan, *Maritime Law and Practice* (Published by the Florida Bar Continuing Legal Education), Section 2.80 (1991 Supp.). However, as can be seen from the survey of decisions following *Miles* set forth below, courts have inconsistently ruled on the issue of whether longshoremen, non-seamen, or their survivors can recover non-pecuniary damages. Some courts have decided that the situs of the injury or accident, i.e., state territorial waters or the high seas, is the determining factor and some courts have decided that the dependency of the survivors on the deceased longshoreman or non-seaman is the determining factor.[11]

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[11] The issue of whether a maritime wrongful death plaintiff is a dependent or nondependent of the decedent is a "red herring" in cases involving deaths of maritime persons, i.e., seamen, longshoremen, and harbor workers. The dependency issue has been a factor when a maritime related death involves a non-maritime person, i.e., recreational boaters. *See Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993) (parents of child killed in a jet-ski accident could not recover non-pecuniary damages under maritime law); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151 (S.D. Fla. 1992) (*Miles* is not controlling in an action by non-dependent of non-seaman injured in state territorial waters); *Lipworth v. Kawasaki Motors Corp.*, 592 So.2d 1151 (Fla. 4th DCA 1992); *Perlman v. Valdes*, 575 So.2d 216 (Fla. 3d DCA 1990). The issue of whether dependency on a maritime person limits the application of *Miles* was squarely addressed in *Anglada v. Tide Water, Inc.*, 752 F. Supp. 722 (E.D. La. 1990). In rejecting the plaintiff's argument to limit *Miles* to actions brought by non-dependents, the *Anglada* court specifically stated that "[t]o read [Miles] so stringently ignores the very language and methodology of the opinion." The *Anglada* Court went on to hold that:

> In fact, the same series of decisions that *[Miles]* abandons are those that courts relied on to create the general maritime right of a spouse to damages for loss

The following survey is a brief outline of decisions which have involved the award or denial of non-pecuniary damages in maritime injury and wrongful death cases brought by non-seamen or their survivors since this Court's decision in *Miles v. Apex Marine*. They are broken down by federal circuits and states. There have been no reported decisions on this subject in the Eighth, Tenth, District of Columbia, and Federal Circuits.

First Circuit

The only decision in the First Circuit which has addressed this issue is *Ferrara v. Fukuoka Senpaku*, 1991 A.M.C. 2249 (D. Mass. 1991), where the court permitted the wife of a longshoreman to recover non-pecuniary damages related to an injury to the husband which occurred in state territorial waters.

Second Circuit

In *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993), the Second Circuit ruled that non-

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> of consortium . . . For example, *[Miles]* unhesitatingly repudiates the breadth of the Supreme Court's earlier decision in *Sealand Services, Inc. v. Gaudet* [citation omitted].

Id. at 724-25. As discussed above, *Miles* corrects the inconsistency between *Higginbotham* and *Gaudet*. Both *Gaudet* and *Higginbotham* involved wrongful death claims by survivors who were dependent on the deceased maritime workers. Clearly, the *Miles* Court did not need to correct the inconsistency between *Gaudet* and *Higginbotham* if dependency on the decedent was the controlling factor.

dependent parents of a deceased jet skier could not recover non-pecuniary damages. However, the *Wahlstrom* court, in discussing *Sea-Land Services, Inc. v. Gaudet*, 94 S.Ct. 806 (1974), implied that the holding of *Gaudet* concerning longshoremen injured or killed in state territorial waters was still binding precedent. Thus *Gaudet* is still good law in the Second Circuit. *See Zicherman v. Korean Airlines Co., Ltd.*, 43 F.3d 18 (2d Cir. 1994) and *Air Disaster at Lockerbie, Scotland on 12/21/88*, 37 F.3d 804 (2d Cir. 1994).

Third Circuit

In the Third Circuit, non-seamen, including longshoremen and their families can recover non-pecuniary damages for an injury to or the death of non-seamen occurring in state territorial waters. *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. 1994) (survivors of recreational boaters killed in pleasure boating accident in state territorial waters could recover non-pecuniary damages if such damages were available under state law); *Koernschild v. W.H. Streit, Inc.*, 834 F. Supp. 711 (D. N.J. 1993) (wife of a longshoreman injured in state territorial waters could recover non-pecuniary damages).

Fourth Circuit

In *Schumacher v. Cooper, III*, 850 F. Supp. 438 (D. S.C. 1994), the Fourth Circuit found that the wife of a swimmer in a lake injured by a boat could recover damages for loss of consortium.

Fifth Circuit

The Fifth Circuit has addressed the instant issue more than once, and has come up with conflicting rules regarding when non-pecuniary damages can be recovered. For example, in *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), a survivor of a longshoreman killed in state territorial waters could recover loss of society damages under *Gaudet*. However, in *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994), the dependents of a longshoreman killed on the high seas could not recover loss of society damages. *Accord, McKee v. Popich Bros. Water Trans., Inc.*, 1994 WL 382, 633 (E.D. La.); *T.J. Hollie v. Consolidated Natural Gas Service Co., Inc.*, 1993 A.M.C. 2161, 1993 W.L. 22191 (E.D. La. 1993); *Robertson v. ARCO Oil and Gas Co.*, 766 F. Supp. 535 (W.D. La. 1991) *aff'd on other grounds*, 948 F.2d 132 (5th Cir. 1991). In *Kelly v. Panama Canal Com'n*, 26 F.3d 597 (5th Cir. 1994), the survivors of a non-seaman killed in Panamanian waters could not recover non-pecuniary damages. Similarly, in *Walker v. Braus*, 861 F. Supp. 527 (E.D. La. 1994), the dependents of a non-seaman killed while operating a fishing boat in state territorial waters could not recover loss of society damages. In short, it appears that the rule in the Fifth Circuit is that the only time non-pecuniary damages can be recovered under general maritime law is in those instances that fall directly under the facts of *Gaudet*, i.e., a longshoreman killed or injured in state territorial waters.

Sixth Circuit

Two courts in the Sixth Circuit have addressed the issue of whether survivors of non-seamen killed in state territorial waters could recover non-pecuniary damages. In *Powers v. Bayliner Marine Corp.*, 855 F. Supp. 199 (W.D. Mich. 1994), the survivors of persons killed during the capsizing of a sailboat were permitted to recover non-pecuniary damages. Likewise in *In re: Moorehead Marine*, 844 F. Supp. 1193 (S.D. Ohio 1994), the survivors of pleasure boaters killed in a boating accident in state territorial waters could recover non-pecuniary damages.

Seventh Circuit

The court in *Emery v. Rock Island Boatworks, Inc.*, 847 F. Supp. 114 (C.D. Ill. 1994) found that passengers injured in a pleasure boating accident which occurred in state territorial waters could recover non-pecuniary damages related to their injuries.

Ninth Circuit

The rule in the Ninth Circuit pertaining to non-pecuniary damages appears to be that if the accident occurred in state territorial waters, non-pecuniary damages can be recovered. *Compare, Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994) (dependents of passenger injured on a cruise ship on the high seas could not recover non-pecuniary damages) and *Usher v. M/V Oceanwave*, 27 F.3d 370 (9th Cir. 1994) (wife of longshoreman injured in state territorial waters could recover non-pecuniary damages);

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) (non-dependents and dependents of pleasure boaters killed in allision between pleasure boat and a Navy buoy in state territorial waters could recover non-pecuniary damages). *But see, Newhouse v. U.S.,* 844 F. Supp. 1389 (D. Nev. 1994) (survivors of non-seaman killed in pleasure boating accident and non-seaman injured in same accident in state territorial waters could not recover non-pecuniary damages in wrongful death action). Note that in *Smallwood v. American Trading & Transport Co.,* 839 F. Supp. 1377 (N.D. Cal. 1993) the court specifically found that *Miles* had overruled *Gaudet* and that non-pecuniary damages under a claim for unseaworthiness were no longer recoverable by survivors of longshoremen killed in state territorial waters; however, the court went on to state that non-pecuniary damages could still be recovered if such damages were available under state law.

Eleventh Circuit

There are conflicting decisions in the Eleventh Circuit on this issue. Compare, *Complaint of Nobles,* 842 F. Supp. 1430 (N.D. Fla. 1993) (complaint of survivors requesting loss of society damages for death of a recreational boater killed in a boating accident in state territorial waters would not be dismissed); *Cantore v. Blue Lagoon Water Sports, Inc.,* 799 F. Supp. 1151 (S.D. Fla. 1992) (dependents of decedent killed in a jet ski accident could recover loss of society damages) and *Frantz v. Brunswick Corp.,* 866 F. Supp. 527 (S.D. Ala. 1994) (although *Gaudet* is still good law, no loss of society damages could be recovered by recreational boaters injured in state territorial waters).

STATE COURTS

Florida

Two Florida courts have denied recovery of non-pecuniary damages. In *Lipworth v. Kawasaki Motors Corp.*, 592 So.2d 1151 (Fla. 4th DCA 1992), the court found that the parents of an 11 year old killed in a jet ski accident could not recover non-pecuniary damages because the parents could not show dependency on the decedent. Arguing the *Lipworth* decision in the negative provides the result that if the parents could have shown dependency, they would have been permitted to recover non-pecuniary damages. This is the holding of *Perlman v. Valdes*, 575 So.2d 216 (Fla. 3d DCA 1990), wherein the court found that the parents of a deceased recreational boater could not recover non-pecuniary damages absent a showing of dependence on the decedent.

Louisiana

The one Louisiana court which has addressed the instant issue directly has found that *Gaudet* had to have been overruled by *Miles. Vedros v. Public Grain Elevator*, 620 So.2d 1376 (La. Ct. App. 1993) (the widow and children of a longshoreman who died from grain asthma which was incurred by the longshoreman as the operator of a grain elevator, could not recover non-pecuniary damages for the death of the longshoreman).

New Jersey

In *Fanoli v. Sealand Services, Inc.*, 598 A.2d 911, 251 N.J.Super. 443, 1992 AMC 1092 (1992), a longshoreman

was injured in a fall from a ladder used as a bridge between a dock and a barge. The court found that the longshoreman's wife could bring a claim against the barge owner under § 905(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), and recover non-pecuniary damages.

Texas

The Texas Supreme Court in *Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran,* 808 S.W.2d 61 (Tex. 1991), found that the survivors of a non-seaman who was crushed to death when a large wave washed ashore causing a shrimp boat to smash into a docked barge and the non-seaman could not recover non-pecuniary damages under general maritime law.

CONCLUSION

The uniformity and clarity intended by this Court in its decision in *Miles* has not been achieved. The inconsistent application of *Miles* has created in some jurisdictions without justification, rational, reason or statutory mandate a super protected class of maritime persons. Courts continue to either ignore or misinterpret the *Miles* decision and as in the instant case permit recovery of non-pecuniary damages in maritime wrongful death actions brought by the survivors of deceased longshoremen or harbor workers killed in state territorial waters. These courts either fail or refuse to recognize that this Court, by remedying the anomaly between *Gaudet* and *Higginbotham,* clearly meant that in the cases of non-seamen,

including longshore and harbor workers, there would be no cause of action for non-pecuniary damages for deaths occurring in territorial waters or on the high seas. *Miles* was intended to restore a uniform rule for the recovery of damages applicable to all maritime wrongful deaths. 111 S.Ct. at 326 (1990). It is in the interest of justice and judicial economy that the uniform rule precluding recovery of non-pecuniary damages under federal maritime law set forth in *Miles* be reiterated and clarified to put this issue to rest once and for all. Therefore this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record
KELLEY DRYE & WARREN
Attorneys for Petitioner
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201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 372-2400

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1995

RAY QUALMANN MARINE CONSTRUCTION, INC.

Appellant,

v.

KIMBERLY ANN SAN, individually and as Personal Representative of the Estate of Lazaro Jesus San, deceased,

Appellee.

CASE NO. 94-0463

L.T. CASE NO. 91-34999 04

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

(Filed Mar. 24, 1995)

Decision filed March 22, 1995

Appeal from the Circuit Court for Broward County; Patricia W. Cocalis, Judge.

Christian D. Keedy and Keith H. Stolzenberg of Kelley, Drye & Warren, Miami, for appellant.

R. Fred Lewis of Magill & Lewis, P.A., Miami, for appellee.

PER CURIAM.

AFFIRMED.

GLICKSTEIN, KLEIN and STEVENSON, JJ., concur.

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD
COUNTY, FLORIDA

CASE NO. 91-34999 04

KIMBERLY ANN SAN,
individually and as Personal
Representative of the Estate
of Lazaro Jesus San,
deceased,

Plaintiff,

v.

RAY QUALMANN MARINE
CONSTRUCTION, INC.,

Defendant.
_____/

FINAL JUDGMENT

(Filed Jan. 18, 1994)

PURSUANT to the Jury Verdict rendered in this cause on Thursday, December 16, 1993, it is thereupon

ORDERED and ADJUDGED as follows:

1. Plaintiff, KIMBERLY ANN SAN, individually and as Personal Representative of the Estate of Lazaro Jesus San, deceased, shall recover ONE MILLION and no/100 ($1,000,000) DOLLARS, from Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., to be allocated as follows:

Kimberly Ann San, wife of decedent $150,000

David Lee San, minor son of decedent $425,000

Daniel Leo San, minor son of decedent $425,000

2. This Judgment shall bear interest at the legal rate beginning December 20, 1993, for which let execution issue.

3. The entry of this Order does not prejudice Defendant's right to be heard on its Motion for Judgment Notwithstanding the Verdict.

DONE and ORDERED in Chambers at Fort Lauderdale, Broward County, Florida on this 13 day of January 1994.

_____
Circuit Judge

Copies furnished:

David H. Gold, Esquire
Keith H. Stolzenberg, Esquire
Amy L. Warpinski, Attorney

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE
COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 91-41303 CA ~~05~~ (04)

KIMBERLY ANN SAN,
individually and as Personal
Representative of the Estate
of Lazaro Jesus San,
deceased,

Plaintiff,

v.

RAY QUALMANN MARINE
CONSTRUCTION, INC.,

Defendant.
_____/

FINAL COST
JUDGMENT

(Filed Jan. 10, 1994)

THIS CAUSE having come before the Court on Plaintiff's Motion to Tax Costs, and the Court being fully advised in the premises, it is

ORDERED and ADJUDGED that Plaintiff's Motion to Tax Costs is hereby granted. Plaintiff shall recover from Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., the sum of EIGHT THOUSAND and 39/100 ($8,000.39) DOLLARS, as taxable costs. This sum shall bear interest at the statutory rate.

DONE and ORDERED in Chambers at Fort Lauderdale, Broward County, Florida on this 7th day of January 1994.

_____

Circuit Court Judge

Copies furnished:

David H. Gold, Esquire
Christian D. Keedy, Esquire
Michael L. Feinstein, Esquire

[p. 31] MR. KEEDY: There is one other issue that has been included in the preliminary matters, Your Honor, that we haven't really touched on, and that is whether their damages are limited to loss of services, and funeral expenses, and loss of support.

If that is the case, which it is our position that [p. 32] it is, then we are going to object to testimony that deals with the noneconomic losses, how much Mrs. San loved her husband, the relationship she had with – that he had, excuse me, with the children, because that's not a compensable element of damages, and at least from their witness list, there are legion of witnesses, mothers, brothers and sisters, that they have listed for that type of witness, which we would contend would be completely inappropriate.

THE COURT: Counsel?

MR. WALD: Judge, the case law is crystal clear that the dispositive issue in determining an entitlement to loss of services – I mean, loss of society, which is what we're talking about here, is whether or not the Plaintiff was dependent financially on the decedent, and under Florida law and under umpteen cases, I can show you that there is a presumption of financial dependence on the part of one spouse to another and on part of the minor children to that parent.

MR. KEEDY: But, Your Honor, the issue is, and I believe this is what they stipulated to at the beginning, is that Florida law doesn't apply, that federal law applies. The Longshoremen and Harbor Workers' Compensation Act, which is federal law, is what applies.

[p. 33] MR. WALD: Absolutely, and under the LHWCA, the dispositive issue is whether or not the Plaintiff was financially dependent on the decedent. I can show you as recently as September 9th, 1992, the case of Cantore versus Blue Lagoon Water Sports, Inc., decided in the United States District Court, Southern District of Florida.

THE COURT: We're going to take that up after voir dire, since the jurors are outside.

MR. KEEDY: Okay.

MR. WALD: Okay, Judge.

MR. KEEDY: That's fine, Your Honor.

THE CLERK: We do have several that had to use the restroom before they come in.

THE COURT: All right.

MR. KEEDY: Your Honor, we have a case of Murray versus Bertucci Construction Company, which is a Fifth Circuit 1992 decision which specifically says that a spouse may not recover loss of society under general maritime law, and loss of society deals with the damages that are grief, loss of consortium, for the children the loss of nurture and guidance, those noneconomic losses.

MR. WALD: You are absolutely correct, only we're not under the general maritime law, we are under the LHWCA, as we have already stipulated, and the law is [p. 34] quite clear.

The controlling case, for the record, is Sea-Land Services, Inc. versus Gaudet, 96 Supreme Court 806.

MR. KEEDY: Your Honor, that case has been overruled by the United States Supreme Court.

MR. WALD: Incorrect, not as it applies to LHWCA cases.

MR. KEEDY: It certainly has.

* * *

[p. 163] MR. KEEDY: All right. One of the issues that is going to be involved in this case, as Mr. Gold has indicated, is the issue of money damages.

I want to ask you that if you believe the evidence causes you to come to a situation where you must consider the money damages, do you understand the difference between ten dollars today and ten dollars ten years from now?

MR. GOLD: Objection, Your Honor. There is no pecuniary loss claim here, and present money value does not have any part in this case.

THE COURT: Is that right?

MR. GOLD: Yes.

MR. KEEDY: May I approach the bench, Your Honor?

THE COURT: If it is not going to be a question, then I don't –

MR. KEEDY: I can't imagine how it can't be.

MR. GOLD: I said there is no – Do you want us to approach?

THE COURT: Yes.

(Thereupon, the following proceedings, were held at sidebar, out of the hearing of the prospective jurors:)

MR. KEEDY: It was my impression that they are seeking to recover loss of support, the dollar amount, money that he was providing to her, that they are [p. 164] intending to try and recover for the loss of services, meaning the dollar compensation for what he might do.

MR. GOLD: The answer is, no, this is a pain and suffering case. There is no claim for loss of services moneywise. Loss of services in kind, yes. This is a plain and simple pain and suffering case, and there is not going to be any pecuniary economic evidence put in front of this jury that would require reductions to the present value at all.

MR. KEEDY: The loss of support certainly does.

MR. GOLD: Are you talking about the net accumulations, disposable income? We're not putting on evidence like that, that his wage at the time was $300 a week.

MR. KEEDY: Whatever evidence – whether he puts the evidence on or not, that's his doing – but, Your Honor, if these people were – if he was providing her a hundred dollars a week, then –

THE COURT: He says he is not asking for that. Are you asking for that?

MR. GOLD: No, we're not. Honest, we're not.

MR. KEEDY: If he is asking for the same support that she received, whatever it was, $150 a week, their damages is an income stream and that income stream has to be reduced to present value.

[p. 165] MR. GOLD: All I'm doing is making the representation to the Court, the trustworthy representation that there will be no evidence of income loss that requires reduction to present value.

THE COURT: Pain and suffering doesn't require that.

MR. KEEDY: Certainly, I agree that pain and suffering don't.

THE COURT: That is all he is asking for.

MR. GOLD: Loss of a father for the two children, and loss of a spouse, emotional pain and suffering.

MR. KEEDY: You are not seeking damages for the loss of support?

MR. GOLD: The loss of support is support in kind, emotional support. We're not asking for monetary damages for money support. No one is going to break it down and say out of $300 this man made a week, $80 went to this, $100 went to the wife, $20 went to this kid, $20 went to that kid, and $20 to the church.

MR. WALD: We're not economizing damages.

MR. GOLD: Not at all.

MR. KEEDY: If this is the position they are going to take, remember this when the verdict form is prepared, and the verdict form can only indicate that those are the elements of loss that they are looking [p. 166] for.

MR. GOLD: Absolutely.

MR. KEEDY: Otherwise, the jury is going to be left with the conclusion that they are looking for, seeking to recover the loss of support and loss of services from an economic standpoint.

THE COURT: He says no.

MR. GOLD: No.

MR. KEEDY: Okay, Well, say it one more time for the record so she can mark it.

MR. GOLD: I said it three times.

MR. KEEDY: Say it so we have a clear understanding again.

MR. GOLD: There will be no evidence or claim for net accumulations, which means income available to support these people, it is just the pain and suffering. You will have three lines in the verdict form, what is the loss for pain and suffering –

MR. WALD: Society.

MR. GOLD: – guidance and society, those are the words, for this child, for this child, for this spouse.

* * *

[p. 176] THE COURT: Okay. What do we need to address that will take approximately two minutes? Because the court personnel need a break too.

MR. GOLD: Judge –

MR. KEEDY: Approximately two minutes?

The only thing that I can think of, Your Honor, is that we have the issue of the elements of damages that they claim are recoverable, that they say their case is limited to, which are non-pecuniary damages, which we contend are not recoverable under the maritime law that has to be applied in this particular case.

THE COURT: Does somebody have a case that I can see that says that it is recoverable, or does somebody have a case that says that it is not recoverable?

MR. WALD: Sure. There is the Miles case. Is that the case that you says overrules it?

MR. KEEDY: Well, that is one of the cases.

MR. WALD: This is the case cited in their trial brief as standing for the proposition that the ruling by the United States Supreme Court in Gaudet – which I'll [p. 177] get it for you – was overruled.

Gaudet was a claim under the Longshore and Harbor Workers' Compensation Act in which the Supreme Court held that the decedent spouse and children could indeed recover damages for the loss of society, pain and suffering.

That particular case, Miles, dealt with a claim under the general maritime law, not the Longshore and Harbor

Workers' Compensation Act. On the very last page of the case, you will see where I have underlined, page 325.

THE COURT: Which created a general maritime wrongful death cause of action.

MR. WALD: Correct.

On page 325 is the important part of the case from our position. And I apologize, I don't have another copy. I'll read over your shoulder.

It says the holding of Gaudet applies only in territorial waters and it applies only to longshoremen. Now, that is a precisely on point.

Lazaro Jesus Sans was a longshoreman, we stipulated to that, the barge was in territorial waters.

What the Miles court did was carve out an exception for claims under the Longshore and Harbor Workers' Compensation Act allowing damages for loss of [p. 178] society in that instance. Now, that is peculiar to the Longshore and Harbor Workers' Compensation Act. Miles does correctly stand for the proposition that outside of that act, you cannot recover non-pecuniary damages under maritime law. We don't dispute that.

THE COURT: DOHSA, by its terms – it says, "Congress made the decision for us."

MR. WALD: Right.

THE COURT: "DOHSA, by its terms, limits recoverable damages in wrongful death suits to, 'pecuniary loss sustained by the persons for whose benefit the suit is brought'."

MR. WALD: Correct. That is DOHSA. This is not a claim under DOHSA.

The controlling case that came out after the Miles case in 1992, Southern District of Florida, deals precisely with the issue of loss of society.

It says – this is what I was talking about earlier – "dependency was the determining factor in an earlier case." Let me find you the operative language. This is citing Miles. "The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen. This language evinces the Supreme Court's intent to limit [p. 179] Gaudet while expanding the Miles analysis." By clear implication the United States Supreme Court is saying that Gaudet remains the law with Longshore and Harbor Workers' Compensation claims.

MR. STOLZENBERG: Your Honor, if I may, the Supreme Court in a footnote on page 325 –

THE COURT: Which case?

MR. STOLZENBERG: In Miles.

THE COURT: Miles, okay.

MR. STOLZENBERG: The Supreme Court specifically points out that Gaudet is no longer applicable because the Longshore and Harbor Workers' Compensation Act would bar that claim if it was brought at the time Miles was decided.

What they are saying is this is a non-case. How can it be precedent for anything else?

The court in Lane v. G & C Towing, the Southern District of West Virginia, the Federal Court addressed

Alvez, which was the same holding as Gaudet and says, as far as Alvez is concerned, the Supreme Court in Miles overruled their decision regarding loss of society.

MR. GOLD: Again, Judge –

MR. STOLZENBERG: So this Court in West Virginia decided that Miles did overrule the holding in Gaudet, and that is what we ask the Court to find also here. [p. 180] Lipworth, the Fourth District Court of Appeals case, is not directly on point because it deals with loss of society recovered for parents who are not dependent on their deceased child. However, what that case did do was find that Miles applies to non-seamen, meaning people not under the Jones Act, and it applies to state territorial waters, which is what we have here. We have a non-seaman in state territorial waters. They held that Miles applies in that situation and it should apply here.

MR. GOLD: DOHSA.

MR. WALD: Judge, that is what distinguishes Miles from this case. There you are under DOHSA, here you are under the LHWCA.

What this footnote says is that the 1972 amendments to the LHWCA have rendered Gaudet inapplicable on these facts, not that Gaudet is no longer good law.

Clearly, after the Miles decision –

THE COURT: Let me have Miles. I have got Gaudet, I have got Miles, and Cantore, and I'm going to read them for ten minutes and the rest of the Court personnel –

MR. STOLZENBERG: Your Honor, here is Lane and there is also Merritt.

[p. 181] MR. WALD: And Cantore, which was decided after Miles, says that Gaudet remains good law.

MR. GOLD: Judge, I know you want to leave, but –

THE COURT: I am leaving and so are the rest of the personnel. It is not fair to the court reporter to have to sit here all afternoon and not get her fingers a rest.

* * *

[p. 185] (Thereupon, the following proceedings were held outside of the presence of the jury:)

THE COURT: The only case I haven't read is Gaudet, but this Southern District, United States District Court for the Southern District of Florida is the latest case that was given to me.

This case says: "Moreover, denying recovery follows the decided wisdom that only dependents should be permitted to recovered for loss of society." Then they go on to discuss the Truehart case, among others.

It says: "This Court is in agreement with Truehart in concluding that a limit based upon dependence is in line with the philosophy of Moragne and subsequent cases." "The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen. This language evinces the Supreme Court's intent to limit Gaudet while expanding the Miles analysis." "As Truehart makes clear, 'the law generally finds it unnecessary to ask whether one spouse depends on money from the other in order to bestow the legal benefits of marriage.' Such dependency is presumed." That's the latest case, and that's the Southern District. The other is the Fifth, and we were no longer even a part of the Fifth District at the time. There is [p. 186] apparently no Eleventh.

MR. KEEDY: No, Your Honor.

THE COURT: So we'll go along with the Cantore case.

MR. STOLZENBERG: Can I have the cite on that, Your Honor?

THE COURT: Sure. It's Cantore versus Blue Lagoon Water Sports, Inc., and the cite is 799 Fed Supp 1151, and that's September of 1992.

* * *

IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 91-34999 04

KIMBERLY ANN SAN, individually
and as Personal Representative
of the Estate of Lazaro Jesus San,
deceased,

Plaintiff,

v.

RAY QUALMANN MARINE
CONSTRUCTION, INC.,

Defendant.

_____ /

MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

The Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., requests this Court to enter judgment in its favor notwithstanding the verdict of the jury and in support thereof would show the Court the following.

1. The jury entered a verdict for the Plaintiff finding that the Defendant was negligent as vessel owner. Judgment for the Defendant should be entered should be entered because the Plaintiff's Amended Complaint did not state a cause of action for vessel negligence. Further, the Plaintiff never amended its pleadings to state a cause of action for vessel negligence. Because the claim of vessel negligence was not properly before the jury, judgment should be entered against the Plaintiff notwithstanding

the jury's verdict. See generally, *Magner v. Merrill Lynch Realty*, 585 So.2d 1040 (Fla. 4th DCA 1991).

2. The Plaintiff stipulated that it was not seeking pecuniary damages (i.e. loss of support or services, funeral expenses, etc.) and consistent with this stipulation, the Plaintiff presented no evidence to support an award for pecuniary damages. As a result, the jury's verdict was solely for non-pecuniary damages (i.e. loss of society, companionship, comfort, etc.) which are not recoverable in admiralty wrongful death actions. See the Defendant's Trial Memorandum, pages 16 -18. Thus, judgment should be entered against the Plaintiff notwithstanding the verdict.

3. Judgment should be entered against the Plaintiff notwithstanding the jury verdict because as a matter of law, workers' compensation immunity bars the Plaintiff's claim. The Plaintiff neither alleged nor proved vessel negligence. Only proof regarding the improper maintenance of the crane was presented at trial. The Plaintiff's own expert testified that this accident would have occurred if the crane had been on land. Simply put, Qualmann as vessel owner had the duty to get the barge into proper position, properly secure the barge, prevent the barge from sinking and warn crane operator and his two assistants (laborers) of nonobvious hazards. Qualmann as vessel owner had no duty to maintain the crane. The maintenance of the crane was an employer, i.e. non-vessel, duty. To hold otherwise would circumvent the workers' compensation immunity granted by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 905(a) and effectively impose liability on vessel owners who also happen to be employers, no matter

the circumstances. See the Defendant's Trial Memorandum, pages 11-16.

4. Judgment should be entered against the Plaintiff notwithstanding the jury verdict because there was insufficient evidence to support a verdict in favor of the Plaintiff. Specifically, there was insufficient evidence that Qualmann in its capacity as vessel owner was in control of the crane at the time of the accident. Although a number of witnesses testified that they were employees of Qualmann at the time of the accident, not one testified that it was acting as an agent or representative of the vessel. The only witness specifically asked whether he was in control of the crane and the barge was Larry Wayne Butler, the crane operator. When asked if he controlled the crane *and* the barge, Mr. Butler answered that he controlled the crane, but not the barge. Testimony from Larry Del Rossi, Mitchell Scavone and Larry Wayne Butler that they were employees of Qualmann does not satisfy the Plaintiff's burden of showing that these employees were acting as agents for the vessel rather than as agents of Qualmann in its non-vessel capacities. Further, the undisputed testimony shows that once the barge was in position for the construction of the seawall the tug would depart and the barge was nothing more than a stationary platform, secured to the Intracoastal bottom by spuds.

WHEREFORE, the Defendant requests this Court to enter judgment against the Plaintiff notwithstanding the verdict.

Respectfully submitted,

KELLEY DRYE & WARREN
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Telephone: (305) 372-2400

By: /s/ Christian D. Keedy
Christian D. Keedy, P.A.
Florida Bar #151619

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered this 23rd day of December, 1993, to: Michael L. Feinstein, Esquire, Ritter, Ritter & Feinstein, 700 South Andrews Avenue, Fort Lauderdale, Florida 33316; and to David H. Gold, Esq., Goldfarb & Gold, P.A., 100 Southeast 2nd Street, Suite 3900, Miami, Florida 33131.

KELLEY DRYE & WARREN

By: /s/ Christian D. Keedy
Christian D. Keedy, P.A.

IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 91-34999 04

KIMBERLY ANN SAN, individually
and as Personal Representative
of the Estate of Lazaro Jesus San,
deceased,

Plaintiff,

v.

RAY QUALMANN MARINE
CONSTRUCTION, INC.,

Defendant.

_____ /

ORDER DENYING MOTION
NOTWITHSTANDING VERDICT

THIS MATTER having come before the Court on January 25, 1994, on the Defendant's Motion for Judgment Notwithstanding Verdict, the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Judgment Notwithstanding Verdict be and the same is hereby denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31 day of January, 1994.

_____
CIRCUIT COURT JUDGE

Copies furnished to:

Christian D. Keedy, P.A.
David H. Gold, Esq.
Michael L. Feinstein, Esq.

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 91-34999 04

RAY QUALMANN MARINE CONSTRUCTION, INC.,

Defendant/Appellant.

v.

KIMBERLY ANN SAN, individually and as Personal Representative of the Estate of Lazaro Jesus San, deceased,

Plaintiff/Appellee,

_____/

NOTICE OF APPEAL

(Filed Feb. 14, 1994)

Notice is given that RAY QUALMANN MARINE CONSTRUCTION, INC., Defendant/Appellant, appeals to the Fourth District Court of Appeal of Florida, the Order of this Court rendered on January 13, 1994. The nature of the Order is a final order entering judgment in favor of the Plaintiff/Appellee on a maritime wrongful death claim for non-pecuniary damages in the amount of $1,000,000.00.

Respectfully submitted,
KELLEY DRYE & WARREN
Attorneys for Defendant/Appellant
2400 Miami Center
201 Biscayne Boulevard
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Telephone: (305) 372-2400

By: /s/ Christian D. Keedy
Christian D. Keedy, P.A.
Florida Bar #151619

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of February, 1994, to: David H. Gold, Esq., Goldfarb & Gold, P.A., One Centrust Financial Center, 100 S.E. 2nd Street, Suite 3900, Miami, Florida 33131 and to Michael L. Feinstein, Esquire, Ritter, Ritter & Feinstein, 700 South Andrews Avenue, Fort Lauderdale, Florida 33316.

KELLEY DRYE & WARREN

By: /s/ Christian D. Keedy
Christian D. Keedy, P.A.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. **94-463**
LOWER TRIBUNAL CASE NO. 91-3499 (04)

RAY QUALMANN MARINE CONSTRUCTION, INC.

Appellant,

- versus -

KIMBERLY ANN SAN, individually and as Personal Representative of the Estate of Lazaro Jesus San,

Appellee.

An Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida in and for Broward County

---

INITIAL BRIEF OF APPELLANT, RAY QUALMANN MARINE CONSTRUCTION, INC.

(Filed May 26, 1994)

CHRISTIAN D. KEEDY, P.A.
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STATEMENT OF THE CASE*

This is an appeal from two final judgments (one on a jury verdict (R. 407-8), the other for costs (R. 403)) entered in favor of the Appellee, the Plaintiff below, pursuant to Fla.R.App.P. 9.110. It is the position of Appellant, Ray Qualmann Marine Construction, Inc. the Defendant below ("Qualmann"), that Judge Patricia Cocalis erred in denying Qualmann's Motions for Directed Verdict and Judgment Notwithstanding the Verdict. The issues presented in these motions are the subject of this appeal, and are (1) whether the Appellee's sole remedy is worker's compensation benefits and (2) whether the Appellee is entitled to recover nonpecuniary damages in a maritime wrongful death action.

STATEMENT OF FACTS

On March 28, 1990, Lazaro Jesus San was killed in a construction accident while working for Ray Qualmann Marine Construction, Inc. ("Qualmann, the Defendant, the Appellant"). (R. 3-10, T. 4). San was working on the replacement of a seawall protecting a home on the Intracoastal Waterway in Ft. Lauderdale, Florida.[1] (T. 244-45, 325-27, 610). The seawall replacement was under a construction contract entered into by Qualmann and the

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* References to pages in the Record of Appeal and Trial Transcript are in the form of "(R.___)" and "(T___)," respectively.

[1] The Intracoastal Waterway is a navigable waterway controlled by the federal government. See generally ***McCormick v. U.S.***, 680 F.2d 345 (5th Cir. 1982).

owner of the home which the seawall protected. To perform some of its duties under the contract, Qualmann used a crane loaded on a barge. (T. 319, 378, 394-5, 430, 675-6, 788). A concrete panel was being lifted by the crane when a cable broke causing the crane's boom to strike and kill San. (T. 252-3, 295, 646). San was on land at the time of the accident. (T. 694-5). San's wife, Kimberly Ann San ("the Plaintiff, the Appellee") individually and as personal representative of the decedent's estate, originally brought suit against Qualmann for wrongful death. In the original Complaint dated September 1, 1991, it was acknowledged that the decedent was an employee of Qualmann. (R. 3-10). Obviously, this cause of action was barred by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 ("LHWCA"), and subsequently, on or about January 21, 1992, the Plaintiff filed an Amended Complaint alleging that the decedent was employed by Tricor Marine Construction, Inc. ("Tricor"). (R. 23-30).

Tricor was incorporated pursuant to Florida law on November 9, 1987, and is wholly owned by Mitchell and Denise Scavone, who are also the owners of Qualmann. (R. 51-2). Tricor's sole function was to purchase workers' compensation insurance for Qualmann employees who were subject to federal workers' compensation laws.[2] (R. 54). Qualmann maintains its Florida workers' compensation insurance by self insuring its employees. (R. 53). However, some of Qualmann's employees work on or near United States navigable waters (hereinafter these employees are referred to as "marine-based workers"),

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[2] As allowed under Section 440.57, Florida Statutes.

and are covered by federal workers' compensation laws, specifically the Longshore and Harbor Workers' Compensation Act.[3] These workers are not covered by Qualmann's Florida workers' compensation self insurance. *See* F.S. 440.09(2) (1989). Qualmann used Tricor to obtain insurance for its marine-based workers because the LHWCA coverage was not available through Qualmann's self-insurance pool. (R. 51-4).

Qualmann's marine-based workers were paid as employees of Tricor while working on navigable waters. (R. 51-4). However, these marine-based workers continued to work for Qualmann in all respects. They received some of their compensation from Tricor, but the majority from Qualmann. (R. 52). The LHWCA compensation insurer based its premium on the quarterly payroll tax returns of Tricor. Tricor would "lend" marine-based workers to Qualmann so that Qualmann could perform its waterborne duties under the seawall replacement construction contract. (R. 51-4).

The facts set forth above were not disputed, thus, Qualmann requested that summary judgment be granted in its favor. (R. 48-148). Qualmann argued at summary judgment that San was a borrowed employee of Qualmann. As Qualmann's borrowed employee, San's sole remedy was workers' compensation benefits. The Plaintiff also filed a Motion for Summary Judgment based upon the same facts upon which Qualmann predicated its Motion for Summary Judgment. (R. 149-53). Judge Cocalis denied both motions for summary judgment without

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[3] ("LHWCA"), 33 U.S.C. § 901 et seq.

explanation. (R. 170-1). Qualmann requested a rehearing because no relevant facts were disputed and all that remained was a legal determination. (R. 172-5). At the rehearing for the first time, and notwithstanding the contrary allegations of the Complaint, the Plaintiff suggested that it had a cause of action under Section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq.

Judge Cocalis failed to rule on Qualmann's Motion for Reconsideration before the deadline for Qualmann to appeal the denial of its Motion for Summary Judgment as a nonfinal appealable order pursuant to Fla. R. App. P. 9.130(a)(c)(vi) which permits appeals from nonfinal orders finding that a party is not entitled to workers' compensation immunity as a matter of law. (R. 184). This Court, in Case No. 93-00340, dismissed the appeal without an opinion. (R. 196).

The case proceeded to trial and there the Appellee stipulated that San was a "borrowed servant" of Qualmann. (T. 4,5). Further, at trial the Appellee dropped her demand for economic or pecuniary damages and stipulated that she sought only nonpecuniary damages.[4] (T. 972). Before, during and after trial,[5] Qualmann requested the Trial Court to direct a verdict in its favor because (1) the Appellee did not state a cause of action or prove its entitlement to damages under Section 905(b) of the

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[4] Nonpecuniary damages include damages for loss of society, companionship, consortium, comfort, care and affection.

[5] (T. 6, 12-15, 876; R. 394-8).

LHWCA and (2) under maritime law nonpecuniary damages are not recoverable in a wrongful death action. The Trial Court denied all of Qualmann's requests for a directed verdict. The case was tried to a jury which returned a verdict in favor of the Appellee and a Final Judgment was entered on the jury verdict on January 19, 1994. (R. 407-8). A separate Judgment for Costs was entered on January 10, 1994. (R. 403).

SUMMARY OF ARGUMENT

This appeal ensues because the Trial Court erred in its application of the law. Qualmann is immune from tort claims under both federal and Florida workers' compensation laws. The Appellee's sole remedy is workers' compensation. Further, the Appellee requested and recovered only nonpecuniary damages which are not recoverable under general maritime law in wrongful death actions. This Court should reverse and dismiss the Amended Complaint with prejudice.

ARGUMENT

I. THE APPELLEE'S EXCLUSIVE REMEDY IS WORKERS' COMPENSATION BENEFITS UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. § 901, ET SEQ.

The parties to this action agree that the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33

U.S.C. § 901 et seq., is the controlling law. (T. 4).[6] *See* 33 U.S.C. § 903 (LHWCA applies to deaths of employees engaged in maritime employment upon navigable waters of the United States). ***See also Browning v. B.F. Diamond Const. Co.,*** 676 F.2d 547 (11th Cir. 1982) (foreman in charge of crane barge was covered by LHWCA where barge was moored in federal waters and crane was unloading metal forms); ***Lemelle v. B.F. Diamond Construction Co.,*** 674 F.2d 296 (4th Cir. 1982) (construction worker employed for the construction of a bridge spanning navigable waters is covered by LHWCA); ***Gilliam v. Wiley N. Jackson Co.,*** 659 F.2d 54 (5th Cir. 1982) (employee injured while unloading barge is covered by LHWCA); ***Trotti & Thompson v. Crawford,*** 631 F.2d 1214 (5th Cir. 1980) (carpenter working on a pier is covered by LHWCA).

But see Penton v. Pompano Construction Co., 976 F.2d 636 (11th Cir. 1992) (construction worker injured while moving crane and clam bucket from barge to land was not a maritime tort, thus, Florida's workers' compensation immunity barred the injured worker's claim). If Florida law applies it is clear that the Appellee is entitled solely to workers' compensation benefits because San was a borrowed employee of Qualmann. (T. 4-5).[7] ***See***

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[6] In the appeal (4th DCA Case No. 93-00340) from the Trial Court's denial of Qualmann's Motion for Summary Judgment, San's counsel in its Answer Brief agreed that the LHWCA governs this action.

[7] Whether Florida law or federal law applies, the Appellee has been protected and compensated for loss by a plan of benefits including workers' compensation and Social Security benefits. Since San's death, his spouse and minor children, relying

Halifax Paving, Inc. v. Scott & Jobalia Constr. Co., Inc., 565 So.2d 1346 (Fla. 1990); ***Booher v. Pepperidge Farm, Inc.***, 468 So.2d 985 (Fla. 1985); ***Brickley v. Gulf Coast Const. Co.***, 14 So.2d 265 (Fla. 1943); ***Morales v. Ryder Truck Rental***, 559 So.2d 317 (Fla. 3d DCA 1990); ***Maxson v. Air Products and Chemicals, Inc.***, 554 So.2d 1212 (Fla. 1st DCA 1990); ***Stephens v. Gencorp Inc.***, 549 So.2d 1051 (Fla. 4th DCA 1989); ***Powell v. Independent Constr.***, 396 So.2d 725 (Fla. 5th DCA 1982); ***Dodge v. William E. Arnold Co.***, 373 So.2d 98 (Fla. 1st DCA 1979).

At argument on Qualmann's Motion for Rehearing of its Motion for Summary Judgment, the Appellee raised for the first time, despite her pleadings to the contrary,

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solely on the aforementioned benefits, have been able to move out of the home of the spouse's parents, move into an apartment and purchase a new automobile without the burden of becoming employed. (T. 592-3). Pursuant to 33 U.S.C. § 909, total weekly benefits for a surviving spouse and minor children are 66 2/3 % of the greater of the national average weekly wage as set by the Secretary of Labor (the 1993 national average weekly wage was $360.57) or the employee's average weekly wage (in the instant case, San's weekly wage was $360.00). Assuming San's children become full time students after they are 18 years old, benefits remain at 66 2/3 % of the national weekly wage until the youngest child is 23 years old. 33 U.S.C. § 902(14), (18). After the children are 23 years old, and assuming the surviving spouse does not remarry, the surviving spouse receives 50% of the national average weekly wage. In the instant case, assuming the above and assuming the life expectancy of a white female 27 years of age based upon the Life Tables, Volume 27, Florida Statutes Annotated (1984) is 80 years, and ignoring that benefits increase over time (see 33 U.S.C. § 910(f)), the total benefits available under LHWCA are approximately $672,000. In addition, the Appellee is receiving Social Security benefits which should roughly total $1,000 a month.

that an action against Qualmann for negligence exists under 33 U.S.C. § 905(b).

The Appellee has never pled such a cause of action, and the Appellant has repeatedly argued this deficiency. (T. 9-10, 14-5); (R. 263-4). Under § 905(b), an injured harbor worker may bring an action against his employer, only if it is a vessel owner and only for *vessel negligence*. In the instant case, Qualmann is the owner of the barge which carried equipment used in the repair of the seawall; however, no vessel negligence was involved in the accident which is the subject of this lawsuit. In fact, not only did the Appellee not plead in her Amended Complaint that she had a cause of action under 33 U.S.C. § 905(b), but she did not plead any acts which would constitute vessel negligence.[8] ***See generally Freshwater v. Vetter,*** 511 So.2d 1114 (Fla. 2d DCA 1987). Review of the Appellee's Amended Complaint reveals that there is no reference to the barge at all either as a cause of the accident or as a vessel. In paragraph 9 of the Amended Complaint (which is attached as Appendix Exhibit), the Appellee sets out those acts of Qualmann which she alleges were negligent. (R. 25-8). Each and every one of the alleged acts of negligence refers to the operation or maintenance of the crane. Again, there is no allegation that vessel negligence was the cause of this accident.

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[8] In her Amended Complaint, the Appellee alleged a cause of action under Florida's Wrongful Death Statute. (R. 23-30). See Brief Appendix Exhibit. Appellant objected at trial that the Appellee never brought an action under § 905(b) of the LHWCA. (T. 9-10, 14-5). See also Qualmann's Trial Memorandum. (R. 263-4). As discussed in the text above, the Appellee's action is clearly barred under Florida law.

Further, the Appellee never sought leave to amend her pleadings to conform to the evidence.

While it is true that the owner of a vessel who is also the employer of an injured worker may only be sued for *vessel negligence* under § 905(b), the vessel owner is still immune from suit under 33 U.S.C. § 905(a) for all acts it takes as the worker's employer. ***Levene v. Pintial Enterprises, Inc.,*** 943 F.2d 528, 531 (5th Cir. 1991), ***citing Jones & Laughlin Steel Corp. v. Pfeifer,*** 462 U.S. 523, 532, 103 S.Ct. 2541, 2548, 76 L.Ed. 2d 768 (1983); ***Kerr-McGee Corp. v. Ma-Ju Marine Serv., Inc.,*** 830 F.2d 1332, 1339 (5th Cir. 1987). The Court in ***Levene*** recognized the importance of differentiating between the duties of a party as vessel owner and as employer stating that:

> The difference between the capacities in which an employer may act is extremely important. The availability of a tort remedy for vessel negligence is a ***limited exception*** to the general structure of the LHWCA, which, like state workers' compensation schemes, generally replaces negligence causes of action against employers with a system of predetermined, standardized benefits.[9] Therefore, we have held

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[9] The purpose of workers' compensation statutes in general is to enable injured workers to receive compensation without fault. ***Clark v. Better Constr. Co.,*** 420 So.2d 929, 931 (Fla. 3d DCA 1982), citing ***The Workmen's Compensation Cases,*** 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); ***Jones v. Florida Power Corp.,*** 72 So.2d 285 (Fla. 1954). In exchange for compensation without regard to fault, employers receive immunity from suit. ***Id.*** In the instant case, under LHWCA, the Appellee is entitled to receive approximately $672,000 (as discussed above in footnote 7).

> that an employer that also functions as a vessel owner is also liable for vessel negligence ***under the same negligence standards applicable to an independent vessel owner.*** [citation omitted]. ***The LHWCA absolutely bars suit for all acts taken in the capacity as the employer of the injured worker.*** [Emphasis added].

Id. at 531.

The Trial Court erred because it failed to make a legal determination as to the duties owed by Qualmann as an employer versus the duties Qualmann owed as a vessel owner. The Appellant, and even the Appellee, requested the Court to make this legal determination. (T. 6,12-15).

Unlike the Trial Court, the *Levene* court determined that an injured employee could not sue his employer, as a vessel owner, for negligence where the actions causing the injury were actions of his employer and not acts of vessel negligence. In *Levene,* the plaintiff was a harbor worker on board a tug, who was ordered by the tug's captain to board a barge to untie the barge's mooring lines. *Id.* at 530. When the plaintiff boarded the barge, it was night time, there was a steady rain, a blowing wind and thunder and lightning. The deck of the barge was illuminated by a spotlight on the tug which provided adequate light down the middle of the barge, but became dim at the end of the barge where the mooring bits were located. The barge was littered with scrap and grease. While on the barge, the plaintiff slipped and was injured. The plaintiff received workers' compensation benefits for his injuries; however, he also brought suit against his employer, as the tug owner, for negligence, alleging that as a vessel owner, his employer failed to warn him of the

hazards on the barge, failed to clear a path on the barge, insisted on his working in bad weather, and failed to properly illuminate the work area. *Id.* The *Levene* court made a legal determination that the allegations that the plaintiff's employer failed to adequately illuminate his path and did not provide him with a safe place to work were acts of the employer. *Id.* at 532. As acts of the employer, rather than as vessel owner, the plaintiff was barred from bringing suit under 33 U.S.C. § 905(a). *Id.* at 535-536.

Likewise, in *Moore v. Phillips Petroleum Company,* 912 F.2d 789 (5th Cir. 1990), the Fifth Circuit Court of Appeals made a legal determination, distinguishing between the duties owed by the defendant, as employer and as time charterer of a vessel. The plaintiff in *Moore* was injured when boarding a fixed platform from a vessel time chartered by his employer. The method of boarding the fixed platform from the vessel was by a rope swing. While the plaintiff was boarding the fixed platform, the rope broke and the plaintiff fell to the deck of the fixed platform and was injured. *Id.* at 790-91. The *Moore* court found that the duty to maintain the rope fell on the platform owner (and possibly the vessel owner) because it was in the best position to maintain the rope. In no event was the plaintiff's employer, as time charterer, responsible for maintaining the rope. *Id.* at 791-92. The defendant in its capacity as the plaintiff's employer had immunity under the Longshore and Harbor Workers' Compensation Act because the plaintiff had received benefits under the Act. *Id.*

In the instant case, the Trial Court failed to make the legal determination that the maintenance and operation

of the crane was a duty of Qualmann acting as San's employer, rather than Qualmann acting as vessel owner. The crane involved in the accident was a land crawler type crane which was not attached to the barge and could move about freely. (T. 394-5, 545, 675-6, 788). The crane was lifting panels to be used in the construction of a seawall (T. 243-52, 646). The panels were guided into place by San and Larry Del Rossi who were standing on the land. (T. 245-6, 326, 693-5, 651, 666). The crane's boom hoist cable snapped causing the boom to fall. (T. 252-3, 644-6). The cause of the accident, according to the Appellee's expert witness, was the improper maintenance of the crane, specifically the improper maintenance of the wire rope boom hoist cable. (T. 506-13). That this is a construction type, non-vessel related accident, is best exemplified by the testimony of the Appellee's own expert witness who testified that this accident probably would have occurred on land. (T. 546).

The Appellee places great weight on the testimony of two of her witnesses, Larry Del Rossi (a laborer whose duties were the same as San's) and Ken Saunders (a former construction supervisor for Qualmann who was not involved in the project where the accident occurred), who gave their ***opinions*** that the crane was part of the barge's equipment and that somehow based upon these opinions the duty to maintain the crane would suddenly fall to the vessel.[10] (T. 319-22, 378). These fly in the face of the undisputed evidence actually presented. The crane was a land crawler type crane which could be and had

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[10] The Appellant objected to the admission of this opinion testimony. (T. 319-20, 322).

been used on the land as well as on the barge. (T. 319, 394-5, 675-6, 785-9). At the time of the accident the crane was on the barge. (T. 318, 430). The crane was not secured or attached to the barge. (T. 319, 394-5, 545, 675-6, 788). The barge could not move on its own but required a tug to move it. (T. 321-2, 823). The tug was not at the site nor in the process of moving the barge at the time of the accident. (T. 321, 710-1, 823-4). The tug, rather than the barge, had a captain. (T. 321-2, 823). Under these undisputed facts, the Trial Court had to find as a matter of law that the maintenance of the crane was a duty of Qualmann, the employer. It is interesting to note that the Appellee's expert, when asked if the crane was the equipment of the barge, responded that the crane and barge were "all one working unit." (T. 528). This testimony was consistent with the testimony of Larry Wayne Butler, the crane operator, who testified that the crane and barge moved as one unit, but that he was in control of the crane, not the barge. (T. 679, 709-10).

In the instant case, the alleged acts of negligence involve only the operation or maintenance of the crane, not the barge. See Appendix Ex. 1; ***Hunter v. Navrom,*** 690 F. Supp. 517 (E.D. La. 1988), ***aff'd,*** 868 F.2d 1386 (5th Cir. 1989) (stevedore employee injured by a spreader bar owned by the stevedore and used to lift bags of rice off a vessel could not sue the vessel owner even if the vessel owner had actual and complete knowledge that using the spreader bar was dangerous). There is not a single allegation in the pleadings nor was there evidence introduced at trial that vessel negligence caused this accident. Qualmann is a marine construction company which was working on the repair of a seawall at the time of the

accident. Like the defendant in *Levene,* Qualmann's negligence, if any, was the result of its duties as San's employer to properly maintain and operate the crane. As an employer paying workers' compensation benefits, Qualmann is entitled to immunity under § 905(a) of the LHWCA.

Failure to distinguish between Qualmann's duties as employer and as vessel owner in the instant case would amount to a judicial repeal of the LHWCA. If Qualmann, as vessel owner, was found liable for failure to properly maintain and operate the crane under § 905(b), there would be no workers' compensation immunity under § 905(a). Such a result would impute an employer's negligence (which is barred by workers' compensation immunity) to the vessel owner creating a situation under § 905(b) whereby Qualmann would never be entitled to workers' compensation immunity under LHWCA even though Qualmann had arranged and paid for workers' compensation insurance, and even though the Appellee is currently receiving workers' compensation benefits. (R. 42-3); (T. 592-3). The inequities and illogic of failing to distinguish between Qualmann, as vessel owner, and Qualmann, as employer, is best illustrated by assuming the accident in the instant case arose in exactly the same manner, but Qualmann did not own the barge. There is no way under the pleadings (Appendix Ex. 1), or the proof presented that an independent third party vessel owner would have any legal liability for San's death.

If the crane fell and killed San while Qualmann was under contract to repair a roof (rather than a seawall), Qualmann would be entitled to workers' compensation immunity. See ***Halifax Paving, Inc. v. Scott & Jobalia***

Constr. Co., 565 So.2d 1346 (Fla. 1990). The result should be no different because the accident occurred while repairing a seawall. ***See generally, Levene***, 943 F.2d 528 (5th Cir. 1991) (defendant as employer, rather than as vessel owner, has duty to provide a safe place to work); ***Coats v. Luedtke Eng. Co.***, 744 F. Supp. 884 (E.D. Wis. 1990) (defendant as employer, rather than as vessel owner, had duty to provide safe ingress and egress to the vessel); ***Brown v. Philippine President Lines, Inc.***, 704 F. Supp. 606 (E.D. Pa. 1989) (vessel owner has no duty to maintain equipment of stevedore); ***Hunter v. Navrom***, 690 F. Supp. 517 (E.D. La. 1988), ***aff'd***, 868 F.2d 1386 (5th Cir. 1989) (stevedore employee injured by a spreader bar used to lift bags of rice and owned by the stevedore could not sue vessel owner even if vessel owner had actual and complete knowledge that using the spreader bar was dangerous); ***Clark v. Better Constr. Co.***, 420 So.2d 929 (Fla. 3d DCA 1982) (employer's duties include providing a safe place to work).

The duty to maintain the crane belonged to Qualmann in its capacity as San's *employer*. In ***Brown v. Philippine President Lines, Inc.***, 704 F. Supp. 606 (E.D. Pa. 1989), a longshoreman injured in a fall from a bulldozer blade to the deck of a vessel could not recover in a § 905(b) action against the vessel owner. The bulldozer was brought on board the vessel by the stevedore. The ***Brown*** court held:

> Ship's gear is the responsibility of the shipowner. The owner must repair and maintain it whether or not the ship is held liable for harm caused by malfunctioning equipment. The same

> is not true of equipment brought on the ship by the stevedore to aid in cargo operations. . . .
>
> The ship is not responsible for the use, maintenance or repair of non-permanent equipment such as the . . . bulldozer. The shipowner had no duty or obligation to intervene in a situation involving the abuse or misuse of the stevedore's equipment.

Id. at 609. Likewise, the negligence, if any, in the operation of the crane is the responsibility of Qualmann, the *employer*, and cannot be the basis for an action under 33 U.S.C. § 905(b). ***Durr v. Global Marine, Inc.,*** 673 F.2d 740 (5th Cir. 1982) (sole remedy of harbor worker who was injured by a crane operator's negligence was workers' compensation benefits); ***Cavalier v. T. Smith and Son, Inc.,*** 668 F.2d 861 (5th Cir. 1982) (flagman for a crane mounted on a barge who was injured by the crane operator's negligence was barred from bringing an action against the vessel owner under Section 905); Matter of Hall-Buck Marine Services, Company, 1988 WL 66977 (E.D. La.). ***See also Halifax Paving, Inc. v. Scott & Jobalia Constr., Co.,*** 565 So.2d 1346 (Fla. 1990) (leased crane and borrowed crane operator whose negligence caused the plaintiff's injury was a work place injury for which the plaintiff's sole remedy was workers' compensation benefits).

In the instant case, the duty to maintain and operate the crane was that of Qualmann acting as San's *employer*. In its capacity as employer, Qualmann is entitled to workers' compensation immunity. Because the Appellee's sole remedy is workers' compensation benefits, the judgments for the Appellee should be reversed.

II. SAN'S SURVIVORS CANNOT RECOVER NONPECUNIARY DAMAGES IN A MARITIME WRONGFUL DEATH ACTION.

As discussed above in Section I, this action is governed by the Longshore and Harbor Workers' Compensation Act which falls under admiralty jurisdiction. Damages awarded in admiralty are governed by general maritime law rather than state law. ***Lipworth v. Kawasaki Motors Corp., U.S.A.***, 592 So.2d 1151 (Fla. 4th DCA 1992). In ***Lipworth***, this Court specifically found that in an admiralty case involving a death, maritime law applied to the exclusion of Florida's wrongful death statute. ***Id.*** at 1154.[11] In the instant case the Appellee only sought to recover nonpecuniary damages under that statute. (T. 972). See also Appendix Exhibit which is the Appellee's Amended Complaint, (R. 23-30), wherein she alleged a cause of action under Florida Wrongful Death Statute. Under general maritime law, nonpecuniary damages are not recoverable. ***Miles v. Apex Marine Corp.***, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed. 2d 275 (1990).

In 1990, the United States Supreme Court changed the damages recoverable under general maritime law for a maritime wrongful death in ***Miles***. As with most admiralty cases, ***Miles*** was not decided in a vacuum, but was a

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[11] The Appellee pled only a Florida wrongful death cause of action, and never amended nor sought leave to amend her pleadings to conform to the evidence. (R. 23-30); (Appendix Ex. 1). The Appellant repeatedly objected and continues to object to the assertion of a § 905(b) claim against it. (T. 6, 12-15, 876; R. 394-8). A party cannot state a new cause of action at trial. See generally, Freshwater, 511 So.2d 1114 (Fla. 2d DCA 1987); Trawick's Florida Practice and Procedure § 14-b (1993).

result of changes in the admiralty law over time. To understand the decision and significance of ***Miles,*** it is necessary to discuss a brief history of admiralty law regarding maritime wrongful deaths.

A maritime wrongful death remedy was unknown until the United States Supreme Court decided ***Moragne v. States Marine Lines, Inc.,*** 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970). In ***Moragne,*** the plaintiff was the widow of a deceased longshoreman killed in state territorial waters. 398 U.S. 376, 90 S.Ct. 1775 (1970). The ***Moragne*** court reversed the trial and appellate courts' determination that absent a statutory remedy the ***Moragne*** plaintiff could not bring a maritime wrongful death claim. The ***Moragne*** court reasoned that a wrongful death claim should be generally available for maritime wrongful deaths because in passing the Death on the High Seas Act[12] and the Jones Act[13] which provided for wrongful death causes of action for deaths on the high seas and deaths of seamen wherever occurring, respectively, Congress had evinced a policy of providing a remedy for maritime wrongful deaths. 398 U.S. 393-409, 90 S.Ct. 1784-92 (1970).

The ***Moragne*** court did not address the issue of damages recoverable for a maritime wrongful death. The Supreme Court addressed the damages issue in 1974 in the case of ***Sea-Land Services, Inc. v. Gaudet,*** 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). The plaintiff in

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[12] Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et seq.*

[13] 46 U.S.C. § 688.

Gaudet, like the *Moragne* plaintiff, was also the widow of a longshoreman killed in state territorial waters. The *Gaudet* court found that non-pecuniary damages, i.e., loss of society, companionship, comfort, protection, care and affection, were recoverable in a maritime wrongful death action. Four years later, the Supreme Court decided whether the holding in *Gaudet* would be applied beyond state territorial waters to permit the recovery of non-pecuniary damages by the widow of a helicopter passenger killed in a crash in the Gulf of Mexico. ***Mobil Oil Corp. v. Higginbotham,*** 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). The *Higginbotham* court found that DOHSA applied. Under DOHSA, nonpecuniary damages cannot be recovered. The *Higginbotham* court specifically rejected the plaintiff's argument that general maritime law as set forth in *Gaudet* could be used to supplement DOHSA and permit the recovery of nonpecuniary damages in all maritime wrongful death actions. 436 U.S. at 624, 98 S.Ct. at 2014. The Supreme Court decided that uniformity in recoveries for wrongful death actions was not as important as the application of DOHSA to the *Higginbotham* facts. *Id.*

The Supreme Court had an opportunity to reconsider the inconsistency created between *Gaudet* and *Higginbotham* when it decided *Miles.* In *Miles,* the plaintiff was a nondependent survivor of a seaman killed in state territorial waters. The issue presented and decided by the Supreme Court was whether the plaintiff could recover nonpecuniary damages under general maritime law. The *Miles* court specifically held:

> We must conclude that there is no recovery for loss of society in a general maritime action for

> the wrongful death of a Jones Act seaman. Our decision also remedies an anomaly we created in ***Higginbotham.*** Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under ***Gaudet,*** and deaths on the high seas. We recognize the value of uniformity, but concluded that a concern for consistency could not override the statute. [citations omitted]. Today we restore a uniform rule applicable to all actions for wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

111 S.Ct. at 326 (1990). Clearly, the ***Miles*** court overruled the damages recoverable for general maritime wrongful death under ***Gaudet.*** The Supreme Court specifically stated that it remedied the inconsistency between ***Gaudet*** and ***Higginbotham.*** If ***Gaudet*** is still good law, the inconsistency between ***Gaudet*** and ***Higginbotham,*** i.e., the availability of recovering nonpecuniary damages for maritime wrongful deaths for deaths occurring in state territorial waters, would remain.[14]

Further, the ***Miles*** court held that ***Gaudet*** was limited to its facts with a caveat that the 1972 amendments to the

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[14] The Supreme Court has now come full circle. In ***Moragne***, the Supreme Court created a maritime cause of action by extending the policies of DOHSA and the Jones Act. ***Moragne***, 398 U.S. 393-409, 90 S.Ct. 1784-92 (1970). The Supreme Court in ***Miles*** has now extended the damages recoverable under DOHSA and the Jones Act to wrongful death actions under general maritime law.

LHWCA have rendered *Gaudet* inapplicable on its facts. 111 S.Ct. at 325 (1990). The significance of limiting a case to its facts when the case no longer has any application was addressed by the *Miles* court. *Gaudet* involved the death of a longshoreman in state territorial waters. The *Miles* court recognized that if the *Gaudet* case was brought after the 1972 amendments to the LHWCA, the plaintiff's actions would have been barred by the LHWCA's workers' compensation immunity. The *Miles* court also noted that the plaintiff in *Moragne*, like the plaintiff in *Gaudet*, would have been barred from bringing an action after the 1972 amendments to the LHWCA. 111 S.Ct. at 323. The *Miles* court specifically rejected the argument that *Moragne* be limited to its facts. The *Miles* court held:

> Were we to limit *Moragne* to its facts, [the] *Miles* [plaintiff] would have no general maritime wrongful death action. ***Indeed, were we to limit Moragne to its facts, that case would no longer have any applicability at all.*** In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act [citations omitted] to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness. [citations omitted]. If *Moragne* would have brought her action today, it would be foreclosed by statute. [Emphasis added.]

111 S.Ct. at 323 (1990). See also *Lane v. G & C Towing Co., Inc.*, 798 F. Supp. 358 (S.D. W.Va. 1992).[15] Because the

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[15] The Lane court found that the *Miles* decision overruled, on the issue of recovery of nonpecuniary damages, *American*

Miles court limited *Gaudet* to its facts, it "no longer has any applicability at all." *Miles*, 111 S.Ct. at 323 (1990).

Since the decision in *Miles*, federal courts have uniformly dismissed claims for loss of society or consortium (i.e., nonpecuniary damages) brought by dependent relatives or survivors of injured or deceased seamen. *Lollie v. Brown Marine Service*, 995 F.2d 1565 (11th Cir. 1993); *Walker v. Braus*, 995 F.2d 77 (5th Cir. 1993); *Smith v. Trinidad Court*, 992 F.2d 996 (9th Cir. 1993); *Murray v. Anthony J. Bertucci Construction Co.*, 958 F.2d 127 (5th Cir. 1992);[16] *Mechel v. Total Transportation, Inc.*, 957 F.2d 186 (5th Cir. 1992); *Lane v. G & C Towing Co.*, 798 F. Supp. 358 (S.D. W.Va. 1992); *Reynolds v. Zapata Off-Shore Co.*, 796 F. Supp. 1015 (S.D. Tex. 1992); *Matter of Waterman SS Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Duplantis v. Texaco, Inc.*, 771 F. Supp 787 (E.D. La. 1991); *Dunbar v. American Commercial Barge Lines, Co.*, 771 F. Supp. 151 (M.D. La. 1991); *Turley v. Co-Mar Off-Shore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991); *Melancon v. Petrostar Corp.*, 762 F. Supp. 1261 (W.D. La. 1991); *Cater v. Placid Oil Co.*, 760 F. Supp. 568 (E.D. La. 1991); *Breland v. Western Oceanic, Inc.*, 755 F. Supp. 718 (W.D. La. 1991); *Anglada v. Tide Water, Inc.*, 752 F. Supp. 722 (E.D. La. 1990). *See also*, Wolfgang Hoppe, The Supreme Court at Sea, Twenty Years of Admiralty Jurisprudence,

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Export Lines, Inc. v. Alvez, 446 U.S. 274 100 S. Ct. 1673, 64 L.Ed. 2d 284 (1980) the holdings and facts of which were the same as *Gaudet*, except that Alvez involved a plaintiff who was an injured longshoreman rather than plaintiffs who were survivors of a deceased longshoreman.

[16] In Murray, the wife and children of a seaman injured while working as a deck hand on board a vessel could not recover nonpecuniary damages.

24 Mar. Law and Com. J. 671 (1993); William B. Milliken, Carl R. Nelson, Roger A. Vaughan, Maritime Law and Practice (Published by the Florida Bar Continuing Legal Education), Section 2.80 (1991 Supp.)

Miles has also been applied to bar claims for non-pecuniary damages brought by dependents of longshoremen injured outside of state territorial waters. ***T.J. Hollie v. Consolidated Natural Gas Service Company, Inc.,*** 1993 AMC 2161; 1993 W.L. 22191 (E.D. La. 1993) (wife of longshoreman who was injured when unloading equipment from a vessel to an oil platform could not recover non-pecuniary damages for her husband's injuries); ***Robertson v. ARCO Oil and Gas Co.,*** 766 F. Supp. 535 (W.D. La. 1991), ***aff'd on other grounds,*** 948 F.2d 132 (5th Cir. 1991). The ***Hollie*** court citing the ***Robertson*** court held that:

> . . . the same damages principles applicable to seamen bringing general maritime law claims . . . apply equally to longshoremen's actions under § 905(b). As no other ability to recover loss of consortium damages in a general maritime tort action exists, the court can discern no reason to provide for such here. It must be remembered that the § 905(b) action is merely an action for maritime negligence . . . We perceive no reason why the dependents of longshoremen should receive favorable treatment in this regard.

Hollie, 1993 AMC at 2162; 1993 W.L. at 2191, citing, ***Robertson,*** 766 F. Supp. at 539.[17]

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[17] As discussed above, the Appellee has not brought nor proven a claim under Section 905(b) (i.e., a claim for vessel negligence).

The reasoning of the ***Hollie*** court is applicable in the instant case. After ***Miles***, there exists no logic to explain the reason the Appellee should now be able to recover nonpecuniary damages for a maritime wrongful death when all of the following cannot recover nonpecuniary damages:

(i) survivors of seamen killed on the high seas or in state territorial waters;

(ii) survivors of longshoremen killed outside state territorial waters; and

(iii) nondependent survivors[18] of non-maritime persons killed in state territorial waters.

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[18] The Appellee argued at trial that ***Miles*** only bars the recovery of non-pecuniary damages in maritime wrongful deaths to nondependents of the decedent. (T. 33). The issue of whether a maritime wrongful death plaintiff is a dependent or nondependent of the decedent is a "red herring" in cases involving deaths of maritime persons, i.e., seamen, longshoremen, and harbor workers. The dependency issue has been a factor when a maritime related death involves a non-maritime person, i.e., recreational boaters. ***See Wahlstrom v. Kawasaki Heavy Industries, Ltd.***, 4 F. 3d 1084 (2d Cir. 1993) (parents of child killed in a jet-ski accident could not recover nonpecuniary damages under maritime law); ***Cantore v. Blue Lagoon Water Sports, Inc.***, 799 F. Supp. 1151 (S.D. Fla. 1992) (***Miles*** is not controlling in an action by non-dependent of non-seaman injured in state territorial waters); ***Lipworth v. Kawasaki Motors Corp.***, 592 So.2d 1151 (Fla. 4th DCA 1992); ***Perlman v. Valdes***, 575 So.2d 216 (Fla. 3d DCA 1990). The issue of whether dependency on a maritime person limits the application of ***Miles*** was squarely addressed in ***Anglada v. Tide Water, Inc.***, 752 F. Supp. 722 (E.D. La. 1990). In rejecting the plaintiff's argument to limit ***Miles*** to actions brought by non-dependents, the Anglada court specifically stated that "[t]o read [Miles] so

It must be noted that in ***Randall v. Chevron, U.S.A.***, 13 F.3d 888, 1994 AMC 1217 (5th Cir. 1994) the Fifth Circuit Court of Appeal misinterpreting the Supreme Court's dicta in ***Miles*** (that ***Gaudet*** was limited to its facts, i.e., a longshoreman killed in state territorial waters) found that the widow and son of a longshoreman killed in state territorial waters could recover nonpecuniary damages from a time-charterer of a vessel. The ***Randall*** court relied simply on the dicta of the Supreme Court and did not consider in its opinion the Supreme Court's express holding in ***Miles*** that ***Miles*** remedied the inconsistent holdings of ***Gaudet*** and ***Higginbotham***. ***Miles***, 111 S.Ct. at 326 (1990). Further, the ***Randall*** court failed to address the ***Miles*** court's holding that ***Gaudet*** no longer has any application. 111 S.Ct. at 323-25. Courts that have addressed the issues presented in this Brief (which issues were not addressed by the ***Randall*** court) have concluded that ***Gaudet***, although "condemned to a

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stringently ignores the very language and methodology of the opinion." The Anglada Court went on to hold that:

> In fact, the same series of decisions that [Miles] abandons are those that courts relied on to create the general maritime right of a spouse to damages for loss of consortium . . . For example, [***Miles***] unhesitatingly repudiates the breadth of the Supreme Court's earlier decision in ***Sealand Services, Inc. v. Gaudet*** [citation omitted].

Id. at 724-25. As discussed above, ***Miles*** corrects the inconsistency between Higginbotham and ***Gaudet***. Both ***Gaudet*** and Higginbotham involved wrongful death claims by survivors who were dependent on the deceased maritime workers. Clearly, the ***Miles*** court did not need to correct the inconsistency between ***Gaudet*** and Higginbotham if dependency on the decedent was the controlling factor.

kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled"[19] is no longer good law. ***Miller v. Amer. Pres. Lines, Ltd.***, 1993 AMC 1217 (6th Cir. 1993) (rejects the reasoning of ***Gaudet*** and holds that no punitive damages are recoverable by seamen under general maritime law); ***Vedros v. Public Grain Elevator of New Orleans, Inc.***, 620 So.2d 1376 (La.Ct.App. 1993) (recognizes that ***Gaudet*** creates an anomaly in the law, refuses to follow ***Gaudet***, follows the trend of the LHWCA and ***Miles*** and finds that the widow of a longshoreman killed as a result of his work in state territorial waters could not recover nonpecuniary damages).

The Appellant is not entitled to recover the only damages she sought, i.e. nonpecuniary damages. This Court, like the ***Vedros*** court, should recognize the illogic of continuing to blindly follow ***Gaudet*** in light of the decision in ***Miles*** which if read in its entirety clearly renders ***Gaudet*** meaningless. Because ***Miles*** is controlling in the instant case, the Appellee cannot recover nonpecuniary damages and the judgment for the Appellee, consisting solely of nonpecuniary damages, must be set aside.[20]

CONCLUSION

The Trial Court committed reversible error on two points. First, it refused to make a legal determination that Qualmann, acting as San's employer, had the duty to

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[19] ***Miller v. Amer. Pres. Lines, Ltd.***, 1993 AMC 1217, 1228 (6th Cir. 1993).

[20] Similarly the judgment for costs must be set aside.

maintain and operate the crane in a non-negligent manner. This was a crane accident which would have happened on land. According to the uncontradicted trial testimony, improper maintenance of the crane's boom hoist cable was the cause of the accident. There is no evidence that the barge caused this accident. The Appellee is receiving workers' compensation benefits (and Social Security benefits), which are her exclusive remedy. The Appellee did not allege in her pleadings, nor prove at trial, a claim for vessel negligence under § 905(b) of the LHWCA.

Second, the Trial Court erred in awarding the Appellee nonpecuniary damages, the only damages sought by the Appellee. The United States Supreme Court's uniform rule is that nonpecuniary damages cannot be recovered under general maritime law for a wrongful death in or outside state territorial waters.

The judgments entered in the Appellee's favor must be set aside, and judgment entered in favor of the Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant, Ray Qualmann Marine Construction, Inc. was mailed this 25th day of May, 1994 to David H. Gold, Esq., Goldfarb & Gold, P.A., 100 S.E. 2nd Street, Suite 3900, Miami, Florida 33131; Michael L. Feinstein, Esq., Ritter, Ritter & Feinstein, 700 South Andrews Avenue, Fort Lauderdale, Florida 33316; and R. Fred Lewis, Esq., Magill & Lewis, P.A., Suite 200, 7211 S.W. 62nd Avenue, Miami, Florida 33143.

KELLEY DRYE & WARREN

By: /s/ Christian D. Keedy
Christian D. Keedy, P.A.

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 91-34999 04

KIMBERLY ANN SAN,
individually and as Personal
Representative of the Estate
of Lazaro Jesus San,
deceased,

Plaintiff,

v.

RAY QUALMANN MARINE
CONSTRUCTION, INC.,

Defendant.

_____/

AMENDED
COMPLAINT AND
DEMAND FOR
JURY TRIAL

Florida Bar No. 260436

COMES NOW the Plaintiff, KIMBERLY ANN SAN, individually and as Personal Representative of the Estate of Lazaro Jesus San, deceased, by and through her undersigned counsel, and sues the Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., and alleges:

1. This is an action for damages in excess of the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs for wrongful death, pursuant to the Florida Wrongful Death Act.

2. At all times material herein the Plaintiff, KIMBERLY ANN SAN, was, is and/or will be the duly appointed Personal Representative of the Estate of Lazaro Jesus San.

3. As the decedent's surviving wife and the person designated and authorized to act as the Personal Representative of his estate, Plaintiff, KIMBERLY ANN SAN, brings this action for her decedent's wrongful death in her individual and representative capacity on behalf of the following beneficiaries and statutory survivors:

Kimberly Ann San:		wife of decedent
David Lee San	:	child of decedent
Daniel Leo San	:	child of decedent

4. At all times material herein the Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., was and is a Florida corporation, with its principal place of business located in Pompano Beach, Broward County, Florida.

5. At all times material herein the Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., was the owner and operator of a certain crane.

6. At all times material herein the decedent, Lazaro Jesus San, was an employee of Tricor Marine Construction acting within the course and scope of his employment.

7. On or about March 28, 1990, decedent, Lazaro Jesus San, was working at a construction site in Broward County, Florida, waiting for a crane owned and operated by the Defendant to lower a concrete panel. Without warning and through no fault of the Plaintiff's decedent, a cable snapped and the crane boom struck and killed Lazaro Jesus San.

8. At all times material herein the Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., owed a

duty to Plaintiff's decedent to operate and/or maintain its crane in a reasonably safe condition, and to exercise the highest degree of care with the ongoing operation, maintenance and repair of its crane.

9. Notwithstanding said duty, Defendant, RAY QUALMANN MARINE CONSTRUCTION, INC., did breach said duty and was negligent by virtue of one or more of the following acts of commission and/or omission:

(a) Defendant did not have a safety program in effect to insure compliance with OSHA safety standards regarding crane use; and/or

(b) Defendant did not have a safety program in effect to insure compliance with OSHA safety standards regarding crane inspections; and/or

(c) Defendant did not have a safety program in effect to insure compliance with OSHA safety standards regarding proper crane rigging procedures; and/or

(d) Defendant did not perform proper crane inspections; and/or

(e) Defendant did not perform proper crane maintenance; and/or

(f) Defendant did not perform proper crane rigging procedures; and/or

(g) Defendant did not mark or identify steel chain slings to show size, grade, capacity or manufacturer; and/or

(h) Defendant did not mark steel chain spreader used to lift the concrete seawall to show its safe working load; and/or

(i) The eyes in wire rope bridles, slings and bull wires were performed by wire rope clips or knots, thereby exposing persons, including the Plaintiff's decedent, to sling failure; and/or

(j) The wire rope clips used on the bottom hoist line and load line were not spread properly, thereby exposing persons, including the Plaintiff's decedent, to boom collapse and load line failures; and/or

(k) The crane being operated by the Defendant did not comply with manufacturer recommendations, thereby exposing persons, including the Plaintiff's decedent, to crane failure; and/or

(l) The main boom pin of the crane was too small thereby exposing persons, including the Plaintiff's decedent, to crane failure; and/or

(m) The Defendant's crane had broken and bent boom lacing, thereby exposing persons, including the Plaintiff's decedent, to crane failure; and/or

(n) Galvanized nails were used in place of cotter pins on the boom, thereby exposing persons, including the Plaintiff's decedent, to crane failure; and/or

(o) There was no operator's manual available for the crane involved in the Plaintiff's decedent's accident; and/or

(p) There was no boom angle indicator available for the crane involved in the Plaintiff's decedent's accident; and/or

(q) The crane was operated without a load capacity chart, thereby exposing persons, including the Plaintiff's decedent, to death or permanent injury; and/or

(r) The crane was operated with wire rope load lines kinked and worn, thereby exposing persons, including the Plaintiff's decedent, to the hazards of rope failure and crushing; and/or

(s) The crane was being operated without any type of swing radius guarding, thereby exposing persons, including the Plaintiff's decedent, to the hazard of being struck by the crane's rotating super structure; and/or

(t) The crane had angle iron welded to the top boom chord, thereby exposing persons, including the Plaintiff's decedent, to being crushed in the event of boom failure; and/or

(u) The crane was not equipped with a boom stop, thereby exposing persons, including Plaintiff's Decedent, to boom failure; and/or

(v) The wire rope on the crane showed severe rust and was not lubricated properly, thereby exposing persons, including the Plaintiff's decedent, to rope failure; and/or

(w) The wire rope bridle used to remove the boom tip had the U-bolt clips on wrong, thereby exposing persons, including the Plaintiff's decedent, to bridle failure; and/or

(x) The crane was overloaded beyond the manufacturer's load capacity, thereby exposing persons, including the Plaintiff's decedent, to boom failure and being struck by falling loads or equipment; and/or

(y) The crane was not equipped with a load capacity chart, thereby exposing persons, including the Plaintiff's decedent, to a crane collapse; and/or

(z) The boom crane was overloaded by approximately two tons beyond its load capacity, thereby exposing persons, including the Plaintiff's decedent, to boom failure and to being struck by falling loads or equipment; and/or

(aa) The crane was overloaded in excess of 75% of its capacity, thereby exposing persons, including the Plaintiff's decedent, to boom failure and to being struck by falling loads or equipment.

(bb) Failed to take any safety precautions whatsoever to see that its crane was not operated under dangerous conditions, including but not limited to excessive loads; and/or

(cc) Failed to advise, instruct or supervise its agents or employee in safe methods of inspecting, maintaining, servicing and loading the subject crane in general and, in particular, under such operating conditions as did exist at the time of the boom failure; and/or

(dd) Negligently operated its crane.

10. As a direct and proximate result of those acts enumerated above in Paragraph 9, all known to the Defendant, the crane cable snapped and the crane boom struck and killed Lazaro Jesus San on March 28, 1990.

11. As a direct and proximate result of the negligence of the Defendant as hereinabove alleged, resulting in the death of Lazaro Jesus San, Plaintiff. KIMBERLY ANN SAN, as Personal Representative of the Estate of her beloved husband, has in the past suffered and will in the future suffer the following damages:

(a) KIMBERLY ANN SAN, as Personal Representative of the Estate of her beloved husband,

Lazaro Jesus San, on behalf of the decedent's Estate, sues the Defendant for the medical, funeral and burial expenses due to Lazaro Jesus San's death that have become a charge against his Estate and/or have been paid on behalf of the decedent;

(b) KIMBERLY ANN SAN, as Personal Representative of the Estate of her beloved husband, Lazaro Jesus San, on behalf of David Lee San and Daniel Leo San, surviving minor children of Lazaro Jesus San, sues the Defendant for their lost parental companionship, instruction and guidance, and for their mental pain and suffering resulting from the death of their beloved father;

(c) KIMBERLY ANN SAN, as Personal Representative of the Estate of her beloved husband, Lazaro Jesus San, KIMBERLY ANN SAN, surviving spouse of Lazaro San, sues the Defendant for the loss of her husband's companionship and protection, and for her own mental pain and suffering resulting from the loss of her beloved husband;

(d) KIMBERLY ANN SAN, as Personal Representative of the Estate of her beloved husband, Lazaro Jesus San, on behalf of all survivors, sues the Defendant for the value of lost support and services from the date of Lazaro San's death, with interest, and for future loss of support and services from the date of Lazaro San's death, reduced to present value.